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WAR AND LAW: CHILCOT'S IRAQI LESSONS AND IRANIAN CHALLENGES

**The Annual 80 Club Lecture is organised by Liberal Democrat Lawyers'
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National Liberal Club**

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Check against Delivery

Baroness Falkner, Ladies and Gentlemen, I begin by thanking the Liberal Democrat Lawyer's Association for inviting me to deliver the Annual 80 Club Lecture, and also for the support provided by CentreForum.

Last September, the respected American commentator Jeffrey Goldberg, writing in the monthly magazine *The Atlantic*, imagined different scenarios responding to the prospect of a nuclearised Iran.² "It is possible", he wrote, "that at some point in the next 12 months, the imposition of devastating economic sanctions on the Islamic Republic of Iran will persuade its leaders to cease their pursuit of nuclear weapons", or that "Iran's reform-minded Green Movement will somehow replace the mullah-led regime", or that "'foiling operations' conducted by the intelligence agencies of Israel, the United States, Great Britain, and other Western powers ... will have hindered Iran's progress in some

¹ Professor of Law, University College London; Barrister, Matrix Chambers. I would like to thank Rabinder Singh QC for his characteristically insightful and pertinent observations, and Ioana Hyde for research assistance.

² Jeffrey Goldberg, 'The Point of No Return', <http://www.theatlantic.com/magazine/archive/1969/12/the-point-of-no-return/8186/>

significant way”, or that President Obama might order a military strike against Iran’s main weapons and uranium-enrichment facilities. But, he went on, “none of these things .. seems, at this moment, terribly likely. What is more likely, then, is that one day next spring, the Israeli national-security adviser, Uzi Arad, and the Israeli defense minister, Ehud Barak, will simultaneously telephone their counterparts at the White House and the Pentagon, to inform them that their prime minister, Benjamin Netanyahu, has just ordered roughly one hundred F-15Es, F-16Is, F-16Cs, and other aircraft of the Israeli air force to fly east toward Iran”.

Fraught conversations will follow. As he speculates,

“the Israelis will tell their American counterparts that they are taking this drastic step because a nuclear Iran poses the gravest threat since Hitler to the physical survival of the Jewish people. The Israelis will also state that they believe they have a reasonable chance of delaying the Iranian nuclear program for at least three to five years. They will tell their American colleagues that Israel was left with no choice. They will not be asking for permission, because it will be too late to ask for permission.”

A far-fetched scenario? Perhaps not. Late last month, through Wikileaks we learnt that King Abdullah of Saudi Arabia had repeatedly urged the US to attack Iran to destroy its nuclear programme.³ When Tony Blair appeared before the Chilcot Inquiry, he made much of Iran’s interference and told the Inquiry that Iran presented “very similar issues to the ones we are discussing here, which is why learning the lessons of this is so important”.⁴ The possibility that military force might be used against Iran raises many serious issues: as a matter of international law, would it be permissible to use military force to prevent Iran from manufacturing a nuclear weapon, in violation of its obligations under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons? What advice will the Attorney General, Dominic Grieve, be giving the government on this matter, and when will he give it? What would the government’s reaction be to such a scenario? In this

³ Ian Black and Simon Tisdall, ‘Saudi Arabia urges US attack on Iran to stop nuclear programme’, *The Guardian*, 28 November 2010, <http://www.guardian.co.uk/world/2010/nov/28/us-embassy-cables-saudis-iran>

⁴ Tony Blair, evidence before the Chilcot Inquiry, 29 January 2010, transcript, p. 55 (also p. 29); <http://www.iraqinquiry.org.uk/transcripts/oralevidence-bydate/100129.aspx>. See also T. Blair, *A Journey* (2010), p. 674.

regard, let's not forget what the 2010 Liberal Democrat election manifesto said: "we oppose military action against Iran". Is that still the case today? Who knows: the Coalition Agreement says only that the Government "will support concerted international efforts to prevent Iran from obtaining a nuclear weapon".⁵

These and other questions are pertinent to the matters currently before the Chilcot Inquiry. They relate to the use of force in international law, the *jus ad bellum*, the circumstances in which military force may be used. Until the twentieth century, there were no general rules of international law to prohibit the use of force by one state against another. The 1919 Covenant of the League of Nations fell far short of outlawing war. In 1928, renunciation of war as "an instrument of national policy" was taken a step further by the Kellogg-Briand Pact, committing signatories to renounce war as between themselves. World War II re-ignited idealist spirits. In August 1941, Franklin Roosevelt and Winston Churchill agreed an Atlantic Charter, expressed their belief "that all of the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force".⁶ The aspiration became a central part of the Charter of the United Nations, adopted in San Francisco in April 1945. Britain and the US joined with forty-five other countries to outlaw the use of force, except under the most limited of conditions. Article 2(4) of the UN Charter declares that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".

Without getting into the issue of the use of force to protect human rights, there are two established exceptions. The first is self-defence: Article 51 of the UN Charter states that nothing in the Charter "shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations". The right is not open-ended. It exists only until such time as the UN Security Council "has taken measures necessary to maintain international peace and security". The compromise language of Article 51 is not free from ambiguity, as more than six decades of practice

⁵ *The Coalition: Our Programme for Government*, May 2010, p. 20; www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf.

⁶ The Atlantic Charter, Common Principle No. 8 (14 August 1941).

and volumes of academic commentary make clear. Article 51 has raised many questions. Can self-defence be invoked before an armed attack has taken place? If there is a right of ‘anticipatory self-defence’, as it is called, can it be invoked where another state acquires — or is in the process of acquiring — weapons of mass destruction?⁷ After the events of September 11th, the issue of anticipatory defence became even more pressing as President Bush’s 2002 National Security Strategy committed the US to act *pre-emptively* to forestall or prevent hostile acts.⁸ In March 2004, Tony Blair seemed to give some support to this, affirming the existence of a “duty and a right to prevent the threat materialising” of the proliferation or illegal acquisition of WMD.⁹ The Bush doctrine — and Mr Blair’s support for it — may well come to the fore in addressing Iran.

The UN Charter allows for a second exception to the prohibition. This is where force has been authorised by the UN Security Council, acting under Chapter VII of the UN Charter. Apart from economic sanctions and other non-military measures available under Article 41 of the Charter, Article 42 allows the Security Council to authorise force “to maintain or restore international peace and security”. For nearly fifty years, until 1990, the Cold War prevented the Security Council from exercising its Article 42 powers. With the collapse of the Soviet bloc, a reinvigorated Security Council emerged.

In November 1990 the Council acted for the first time to authorise force under Chapter VII, in response to Iraq’s unlawful invasion of Kuwait.¹⁰ Resolution 678 authorised member States “to use all necessary means” to uphold and implement previous Security Council resolutions and to restore peace and security in the area.¹¹ Since then, Chapter VII powers have been relied upon quite regularly to authorise different measures, for example in Somalia, the Balkans, Liberia, Sierra Leone, Haiti and East Timor.

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⁷ See Sands, n.3 above.

⁸ United States, ‘The National Security Strategy’ (September 2002), at p. 15, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>.

⁹ Tony Blair, Speech in Sedgefield, in The Guardian (5 March 2004), available at <http://www.guardian.co.uk/politics/2004/mar/05/iraq.iraq>.

¹⁰ In 1966, Article 42 had provided the basis for the Security Council’s authorisation for Britain to use force against tankers discharging oil from Rhodesia.

¹¹ Resolution 678 does not mention article 42, which has led to different views as to whether that provision was indeed the legal basis on which force was authorised. Although that seems to be the more compelling view, there is some academic support for the view that the Council was acting on the basis of Article 42 and 51 of the Charter: see Bruno Simma, ‘The Charter of the United Nations: A Commentary’ (1st ed. Routledge & Keegan Paul, London 1995), p. 635.

That is the background, in brief, against which the use of force against Iraq falls to be considered. It raises serious questions about the extent to which international law can ever really limit the use of force by states, a matter on which I have no illusions. It is noteworthy, however, that when states use force they invariably seek to find a justification in law. That happened in relation to Iraq in 2003, and the subject of legality was and remains a very live issue: it is what caused the last Labour government to make a parliamentary statement on 17 March 2003, by way of a short written answer by then Attorney General Lord Goldsmith, asserting that the war was unambiguously lawful. That statement, it is now clear, was wrong.

Just ten days before that parliamentary answer was given, on 7 March 2003, I had joined fourteen other legal academics in writing a letter to the Prime Minister, in which we expressed our view that "On the basis of the information publicly available, there is no justification under international law for the use of military force against Iraq. [. . .] Before military action can lawfully be undertaken against Iraq, the Security Council must have indicated its clearly expressed assent. It has not yet done so."¹² The letter was also published in the Guardian newspaper on 7 March 2003. We are still waiting for a reply from Mr Blair! We didn't know that, on the very same day, he'd received a confidential note from Lord Goldsmith setting out a markedly different opinion than the view set out in the Parliamentary answer: that whilst an argument for legality could be made, it was more likely than not that a court would conclude that the war was unlawful. As my colleague Rabinder Singh QC has put it, in setting out the prospects of success, the opinion of 7 March 2003 does not reach the threshold necessary to obtain legal aid if one were taking a case against the government. I only learnt about the existence of Lord Goldsmith's secret memorandum of 7 March 2003 a year and a half later, in the autumn of 2004, whilst researching my book *Lawless World*. In February 2005 the book revealed the existence – for the first time - of Lord Goldsmith's secret advice to the Prime Minister and the details of the resignation letter of FCO deputy legal adviser Elizabeth Wilmshurst, noting that Lord Goldsmith had changed his mind "again" – i.e. more than once. Ms Wilmshurst wrote that she could not

"in conscience go along with advice ... which asserts the legitimacy of military

¹² Ulf Bernitz et al, 'War would be illegal', in The Guardian (7 March 2003), available at <http://www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq>.

action without such a resolution, particularly since an unlawful use of force on such a scale amounts to the crime of aggression ... in circumstances which are so detrimental to the international order and the rule of law”.

I’ve sometimes wondered about a counterfactual: what if the full text of Lord Goldsmith’s secret advice had never emerged? We would not have known about the full extent of his abrupt change of direction, or begin to know the circumstances of its occurrence. Information begets more information. A couple of months after my account, in the midst of the 2005 general election campaign, Tony Blair published the full text of the Goldsmith advice. He did so on the basis of a misapprehension, when confronted by Jon Snow, the Channel 4 News presenter, believing that Snow had the full advice. In fact, he didn’t: he only had two of the 13 pages, and only five of the 36 paragraph advice. On the basis of his misapprehension, Mr Blair made the full text of the advice available, a dramatic moment: it made crystal clear the gulf between the private advice of 7 March 2003 and the public statement of 17 March 2003. It also underscored the fact that the Prime Minister was not accurate when he said that the Attorney General had given “clear” advice, and had been “consistent” in his approach. The lack of candour has only served to fuel speculation as to what exactly happened between the 7 and 17 March 2003, and also what occurred in the period before 7 March 2003.

For years government resisted calls for a full inquiry on this and other issues. Then in June 2009, Prime Minister Gordon Brown finally announced an inquiry, to coincide with the departure of British troops from Iraq. It would be chaired by a retired senior civil servant, Sir John Chilcot – a “safe pair of hands,” the *Guardian* has called him—and would work behind closed doors under arrangements designed to minimize public disclosure of the underlying documents, many of which were classified as “Secret.” Sir John summarized the inquiry’s mandate as considering “the UK’s involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned.”

At its launch on 30 July 2009, expectations of the inquiry were - to put it generously - low. The carefully chosen five-member panel did not lead to a quickening of public interest. The recent suggestion – again from Wikileaks – that a couple of months after its launch the Labour Government would take steps to “put measures in place to protect

[US] interests” during the inquiry, hardly provides reassurance as to its independence.¹³ One member, the historian Sir Martin Gilbert, had previously suggested that Tony Blair and George W. Bush might bear comparison with Winston Churchill and FDR. Another, the academic Sir Lawrence Freedman, contributed to the preparation of the 1999 Chicago speech in which Tony Blair gave vent to the emotional and ahistorical interventionist instincts that led this country into Iraq. None of the five has any legal background or qualification, as the examination of witnesses has shown: think Gilbert and Sullivan rather than Old Bailey. The only member to demonstrate consistent forensic ability and mastery of the evidence is Sir Roderic Lyne, a retired diplomat. Most of the key witnesses, particularly the lawyers, politicians, and diplomats, have been adept at swatting away questions. More significantly, the inquiry has been undermined by its inability to refer publicly to documents that it has seen – and that in some instances I have seen – and that contradict or undermine witness testimony. It did not seem that its final report, now not expected before early in the new year, would be revelatory or forceful. Expectations are low, but it is right to keep an open mind.

That is because a combination of a sceptical public, media interest and political pressures have combined to force greater openness. Many – but not all – of the hearings have been public and broadcast on TV and the internet, and for some appearances – those of Messrs. Blair, Brown, Straw and Goldsmith in particular – there has been widespread media attention. Some previously classified documents have been made public by the inquiry, not least in relation to the legal issues. These include a damning one-page minute dated January 30, 2003, from Lord Goldsmith to Tony Blair. The document ends with the words “I have not copied this minute further,” and it says much about our former Prime Minister’s *modus operandi*, of the tragic weakness of his Attorney General, and the extent to which the British Parliament, Cabinet, and people – including people in this room – were misled by these two men. The document includes brief, handwritten reactions that are particularly telling. Nothing beats raw material in black and white. We will return to it shortly.

¹³ Christopher Hope, ‘WikiLeaks: British government promised to ‘protect US interests’ at Chilcot inquiry’, The Daily Telegraph, 1 December 2010, <http://www.telegraph.co.uk/news/worldnews/wikileaks/8172243/WikiLeaks-British-government-promised-to-protect-US-interests-at-Chilcot-inquiry.html>

In spite of the limitations imposed upon it, the Chilcot Inquiry has succeeded in teasing out some new information, filling out if not completing a picture the broad lines of which were well known before it commenced. The general conclusions are inevitable and unsurprising: Mr Blair gave President Bush an early commitment of support without extracting anything much in return or developing a basis for leverage; he needed to justify his desire to remove Saddam by overstating the very limited and not probative evidence of Saddam's alleged activity concerning WMDs, and then manipulated its public presentation; he persuaded President Bush to go down the UN route, but in so doing he badly undermined his own position by agreeing to a Security Council resolution that his own Attorney General told him was an inadequate basis for war; and then he failed to live up to his own expectations of his ability to persuade the Security Council to vote for a second resolution.

As all this was proceeding, and after the invasion took place, Blair failed to intervene in order to remedy the badly conceived and managed post-conflict situation. Against this background, his refusal at the inquiry to express any regret whatever for his actions defined a rare, memorable moment. So surprised did Sir John Chilcot seem that at the end of the session, he twice offered Blair an opportunity to express some regret. To the allegations of incompetence, deception, and criminality there are now added the charges of hubris and bad form.

* * *

A question that runs through the narrative concerns the legality of a war that was not (and could not be) justified on the grounds of self-defense. Mr Blair only sought to justify the war on the grounds that it had been authorized by the Security Council. On March 17, 2003, in his answer to a parliamentary question on the legal authority for war, Lord Goldsmith seemed to be saying to the Cabinet, Parliament and the public that military force was unambiguously lawful.

The 337 words were, we now know, an advocacy document for which Lord Goldsmith required the assistance of no fewer than nine lawyers and senior civil servants. It had the great merit of simplicity: according to the parliamentary answer, Security Council Resolution 678 authorized the 1990 Iraq intervention and was "revived" as a result of Saddam's "material breach" of the terms of the subsequent ceasefire. At the heart of the

argument is Resolution 1441, adopted unanimously by the Security Council in November 2002. According to Lord Goldsmith, Resolution 1441 gave Iraq “a final opportunity to comply with its disarmament obligations” and determined that a failure to so comply and cooperate would constitute a further material breach of those obligations. “It is plain,” wrote Lord Goldsmith, “that Iraq has failed so to comply,” thus giving rise to a material breach and the revival of the original authority to use force. But plain to whom?

Lord Goldsmith’s parliamentary answer skated over the crucial question: Who decides whether Iraq is in material breach, is it the Security Council or can one or more individual members such as the US or the UK so decide? It is virtually impossible to find any seasoned international lawyer in Britain who agrees with Lord Goldsmith’s conclusion in the answer to the Parliamentary question that the Security Council did not have to make this decision in the form of a new resolution or by other means. It is now clear that, until shortly before he put his name to the 337-word statement, he didn’t agree with it either. Looking forward, this volte face has made it more difficult to achieve Security Council consensus on Iran, given concerns that language will be unilaterally re-interpreted to support actions that were not intended.

In any event, even before the Chilcot inquiry, it was known that the Attorney General had changed his mind just days before the war. His 7 March 2003 secret advice concluded that although a “revival” argument could be made, it would probably not be successful if it were to reach a court of law. It seems that he recognised that the better view was that the war was unlawful. The 7 March 2003 memo was not put before the Cabinet, which, like Parliament, had no inkling about the Attorney General’s serious doubts. The Inquiry has teased out that it was Foreign Secretary Jack Straw who talked Goldsmith out of sharing his doubts with the Cabinet, reflecting both men’s lack of backbone and their willingness to mislead.¹⁴ Nor was the Cabinet aware of the decisive role played by senior Bush administration lawyers in contributing to Lord Goldsmith’s change of mind. “We had trouble with your attorney,” the legal adviser to Condoleezza Rice—John Bellinger—later told a visiting British official, “we got him there eventually.”¹⁵ Nor did the Cabinet learn of the terms of the resignation letter of the deputy legal adviser at the Foreign

¹⁴ Simon McDonald, ‘Iraq: Meeting with the Attorney General’ (17 March 2003), available at http://www.iraqinquiry.org.uk/media/43523/doc_2010_01_26_11_06_14_637.pdf.

¹⁵ Philippe Sands, ‘Lawless World: America and the Making and Breaking of Global Rules’, (Allen Lane, London 2005).

Office, Elizabeth Wilmshurst, that referred to Lord Goldsmith's late change of mind without revealing details.

Lawyers are of course entitled to change their minds, and frequently do. New facts emerge, or new legal arguments come to the fore. Between March 7 and March 17, 2003, there were, however, no new facts and no new legal arguments on which Lord Goldsmith could rely. In the intervening seven years, he has not been able to provide a convincing explanation for his change of position to rebut the obvious inference that he succumbed to political pressures. When Lord Goldsmith appeared before the Chilcot inquiry on January 27, 2010, he was under pressure to explain. His silky performance did not dispel the doubts. He confirmed that his change of mind was largely due to the persuasive arguments of senior Bush administration lawyers, with whom he had met in early February 2003. Tantalizingly, during his appearance, new information did emerge about the views he had expressed in writing *before* March 7, 2003. This suggested that the inquiry had before it other documents that were not publicly available. Without being able to refer to the documents, his inquisitors were barely able to lay a glove on the former attorney general.

Then, in May 2010, Labour lost the general election and the new government came into office. This appears to have contributed to a decision to declassify documents for which the inquiry, as the Cabinet secretary put it, had waited for "some time."¹⁶ On June 25, around its first anniversary, the Inquiry quietly published a set of documents that laid bare the clear and consistent legal advice that Lord Goldsmith gave to Tony Blair at key moments, from July 2002 right up to February 12, 2003. The documents paint a devastating picture, principally (but not only) emphasizing the Attorney General's sudden, late, and total change of direction. Following a year of consistent advice, he made a 180-degree turn in the space of a month.

The trail is an unhappy one. On 30 July 2002, Lord Goldsmith wrote the prime minister that self-defense and humanitarian intervention were not admissible, and that military action without explicit Security Council authorization would be "highly debatable."¹⁷ On

¹⁶ Gus O'Donnell, Letter to Sir John Chilcot regarding declassification of draft legal advice (25 June 2010), available at <http://www.iraqinquiry.org.uk/media/46469/ODonnell-to-Chilcot-re-declassification-250610.pdf>.

¹⁷ Lord Goldsmith, Letter to Prime Minister Tony Blair regarding Iraq (30 July 2002), p. 3 at 13, available at <http://www.iraqinquiry.org.uk/media/46499/Goldsmith-note-to-PM-30July2002.pdf>.

18 October 2002, he told Straw that the draft of Security Council Resolution 1441 “did not provide legal authorization for the use of force,” and that the British government must not “promise the US government that it can do things which the Attorney considers to be unlawful.”¹⁸ On 11 November 2002, immediately after Resolution 1441 was adopted, he told Jonathan Powell (Blair’s chief of staff) that “he was not at all optimistic” that there would be “a sound legal basis for the use of force against Iraq.”¹⁹ At a Downing Street meeting on 19 December 2002, Goldsmith declined to tell those present that they would have a green light for war without a further resolution.²⁰ On 14 January 2003, he wrote a draft memo that concluded without ambiguity that “resolution 1441 does not revive the authorisation to use of force contained in resolution 678 in the absence of a further decision of the Security Council.”²¹ These words directly contradict what he would later tell the Cabinet and Parliament.

Which brings us to the most devastating document, Goldsmith’s 30 January 2003, one-pager to Blair, written the day before Blair’s meeting with President Bush at the White House. [YOU CAN SEE IT ON THE SCREEN NOW, AND COPIES ARE ON YOUR SEATS] Lord Goldsmith explained that “I thought you might wish to know where I stand on the question of whether a further decision of the Security Council is legally required in order to authorise the use of force against Iraq.” His conclusion? “I remain of the view that the correct legal interpretation of resolution 1441 is that it does not authorise the use of military force without a further determination by the Security Council.” Clear, unambiguous, and without caveat. The published version of this message, includes some gloriously graphic handwritten reactions of three key players.

In the top left-hand corner, Sir David Manning, Blair’s principal foreign policy adviser,

¹⁸ David Brummel, Record of Attorney General’s conversation with the Foreign Secretary on 18 October (11 November 2002), p. 1 at 4, available at <http://www.iraqinquiry.org.uk/media/46478/AGO-note-of-Goldsmith-Straw-telecon-18October2002.pdf>.

¹⁹ David Brummel, Note of telephone conversation between the Attorney General and Jonathan Powell on 11 November 2002 (11 November 2002) p. 1 at 2, available at <http://www.iraqinquiry.org.uk/media/46475/AGO-note-of-Goldsmith-Powell-telecon-11November2002.pdf>.

²⁰ See David Brummel, Note of meeting at No. 10 Downing Street on 19 December 2002 (19 December 2002), available at <http://www.iraqinquiry.org.uk/media/46472/AGO-note-of-Goldsmith-No10-meeting-19December2002.pdf>.

²¹ Lord Goldsmith, Draft legal advice to Prime Minister Tony Blair regarding the interpretation of resolution 1441 (14 January 2003), p. 5 at 13, available at <http://www.iraqinquiry.org.uk/media/46493/Goldsmith-draft-advice-14January2003.pdf>.

notes: “Clear advice from Attorney on need for further Resolution.” Alongside, Matthew Rycroft, who served as Blair’s private secretary, sounds irritated: “Specifically said we did not need further advice this week” (this seems to confirm claims that Blair did not want a paper trail of early, unhelpful advice). And on the left-hand side of the minute, with Lord Goldsmith’s damning conclusions underlined by the same hand, these scrawled words: “I just don’t understand this.” The handwriting is Blair’s, and it is difficult to see quite what he might have had trouble understanding. Lord Goldsmith’s words - consistent with every view he had expressed over the previous six months - admit of no doubt, adopting the views taken by the UK since 1990 by the Foreign Office legal advisers, and by virtually every international lawyer in Britain (if not the world, outside of the US).

What Blair seems to be saying is that he doesn’t understand why this wretchedly unhelpful view was reduced to writing at that critical moment. The timing could not have been worse. The next day, on 31 January 2003, Blair met Bush, accompanied by Sir David Manning and Matthew Rycroft. Sir David wrote up a widely reported five-page note of the meeting that is before the inquiry but has not yet been made public in full. Sir David records the President telling Blair that the US would put its full weight behind efforts to get another Security Council resolution but if that failed, “military action would follow anyway”; that the “start date for the military campaign was now pencilled in for 10 March,” which was “when the bombing would begin”; and that the “diplomatic strategy had to be arranged around the military planning.” Sir David then records Blair’s response, stating that he was “solidly” with the President and ready to do whatever it took to disarm Saddam. He wants a second resolution “if we could possibly get one,” because it would make it much easier politically to deal with Saddam, and as an insurance policy “against the unexpected.” According to the memo, which the Chilcot Inquiry has but which has not been made public, the Prime Minister completely ignores the views of the Attorney General, who has told him only the previous day that a further resolution is necessary to act lawfully, not merely desirable.

It is against this background that the Attorney General’s sharp change of mind will surely haunt him. After Blair’s meeting with Bush, Lord Goldsmith travelled to the US to meet the Bush administration lawyers (he made no similar trip to any other country, whose lawyers would no doubt have held rather different opinions). He told the Chilcot inquiry

that it was their views that caused him to abandon his long-held position. Yet many of the Bush administration's lawyers with whom he engaged were among the officials who failed to prevent the Bush administration's descent into serial illegalities in 2001 and 2002: ditching the Geneva Conventions, imprisoning suspects at Guantánamo without granting them minimum rights, and embracing waterboarding and other acts of obvious torture. Goldsmith has spoken out against all these measures. Just why Lord Goldsmith would find the US lawyers' views on the use of force any more convincing is a question that seems to admit of only one answer. Many have concluded that he was accommodating the desires of the Prime Minister. As the International Court of Justice put the point in its first and famous 1949 Judgment in the Corfu Channel case, "a series of facts linked together [lead] logically to a single conclusion."²²

In my view, the Chilcot inquiry has given us all we need on this dismal story: the evasive testimonies and the few but damning documents provide an incontrovertible account. The proceedings of the inquiry expose lamentable and dysfunctional decision-making processes that have brought Britain into international disrepute, even if the Inquiry's mandate and its members' lack of formal legal qualifications necessarily mean that it has no particular authority to express a view on the illegality of the war. (I note here that in January 2010, a parallel Dutch inquiry chaired by a retired Supreme Court judge and largely composed of lawyers concluded that the war was illegal, contributing to the downfall of the Dutch government.)²³

In late July, Deputy Prime Minister Nick Clegg, standing in for Prime Minister David Cameron at the Dispatch Box in Parliament, described the war as "illegal"²⁴ (he subsequently repeated that view in September 2010 in a speech to the UN General Assembly).²⁵ When asked for clarification about whether this was now British

²² *Corfu Channel case*, ICJ, Judgment (April 9, 1949), p. 4, at 18.

²³ *Rapport Commissie Van Onderzoek Besluitvorming Irak*, January 2010 (summary and Conclusions in English at pp. 519 et seq.) See also: Afua Hirsch, 'Iraq invasion violated international law, Dutch inquiry finds', in *The Guardian* (12 January 2010), available at <http://www.guardian.co.uk/world/2010/jan/12/iraq-invasion-violated-international-law-dutch-inquiry-finds>.

²⁴ Nick Clegg, Address before the House of Commons on 21 July 2010 (21 July 2010), Column 346, available at <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100721/debtext/100721-0001.htm>.

²⁵ See Nick Clegg, Speech to the UN General Assembly (24 September 2010), available at <http://www.number10.gov.uk/news/speeches-and-transcripts/2010/09/deputy-pms-speech-to-the-un-general-assembly-55287>.

government policy, the Government's official spokesman conspicuously failed to back Blair and Goldsmith and to defend the war as lawful, indicating instead that the new government would prefer to await the outcome of the Chilcot inquiry.²⁶ A spokesman for the inquiry was then reported as saying that Sir John would not make a conclusion on whether the war was legal.²⁷ In British parlance, this is called a dog's breakfast. In any event, the British public has come to be deeply skeptical about such inquiries. In the court of public opinion, for this one in particular, the process and its revelations may be more significant and lasting in their effects than any final report that eventually emerges.

That is not to say, however, that the Report of the Chilcot Inquiry might not play a useful role, in at least three respects, all of which are pertinent to the Iran issue: first, contributing to the restoration of public trust in government, on the vital issue of recourse to the use of force; second, providing strong support to lawyers and others in the civil service to ensure that in future they are able to carry out their duties without being subject to disdain or undue political pressures; and third, underscoring Britain's commitment to support for – and compliance with – the rule of law at the international level. Let me be clear: I am not starry-eyed about international law, and recognise that on vital issues of national security, the writ of the international rules may sometimes be limited. I recognise also that currently, in the face of technological changes and the emergence of malign non-State actors, it will be said that rules created in another era are not up to the task of dealing with current realities. Whatever the merits of that view – and it is not one that I share – the reality is that Iraq in 2003 did not raise issues about self-defence, or humanitarian intervention or the adequacy of international rules. The rules are clear, and in my view they were clearly violated. This view has been set out with clarity and force by Lord Alexander of Weedon (the former Chairman of the Bar Council), in the *Justice/Tom Sargant Annual Memorial Lecture (2003)*, and Lord Bingham (the former Senior Law Lord) in his book *The Rule of Law*.²⁸ The Chilcot Inquiry should say this, but

²⁶ See UK Government, Press briefing of 21 July 2010 (21 July 2010), available at <http://www.number10.gov.uk/news/press-briefings/2010/07/afternoon-press-briefing-from-21-july-2010-53769>.

²⁷ See Iraq Inquiry Committee discussion of the inquiry's outcome, indicating it "is not a court of law". Iraq Inquiry Committee, 'Frequently Asked Questions', available at <http://www.iraqinquiry.org.uk/faq.aspx>.

²⁸ Tom Bingham, 'The Rule of Law', (Penguin, London 2010), at pp. 120-129.

of course it is unlikely that it will do so. If it is to be timid, then, the better course would be to say nothing at all about the substantive legal issues, not that the war was unlawful (given that the membership has no qualification to express that view in an authoritative way, by contrast to the Dutch inquiry, which was largely composed of lawyers) or that the war was lawful. And how can it plausibly say that there was a respectable argument for legality, given the near total lack of support for such a view. The Inquiry is no doubt aware that its credibility is on the edge of an abyss. That may be one reason why it has decided to recall a number of witnesses, including Tony Blair, as an exercise in self-preservation.

Still, it seems that the Inquiry may not wish to be accused of dodging all the legal issues, given some steps it has taken. Curiously, this inquiry has no independent legal counsel to assist, as is usual for inquiries of this kind. An independent counsel assesses evidence and prepares and contributes to the questioning of witnesses, relying on the particular skills that lawyers can offer. The absence has been apparent during the public hearings. What the Inquiry has done, however, is to appoint an “adviser on international law”, the distinguished international lawyer Dame Rosalyn Higgins, former Judge and President of the International Court of Justice. It is unclear, however, what the role of the “adviser” actually is, or the nature of the advice that has been provided. With respect, it is surely not the role of an adviser to deal with the substantive merits of the issue, that is and can only be a matter for the members of the Inquiry. This is all the more so given that every international lawyer in the country holds views about the legality of the war, and has expressed them publicly or – on occasion in my presence – privately. At most public inquiries, issues of law are ventilated openly and can be argued in public. So the role of the adviser necessarily raises issues of process and transparency.

In June this year, the Inquiry posted a curious advertisement inviting international lawyers to submit their views on certain issues of law.²⁹ This too is a novel approach. Some notable legal experts have chosen not to respond: one senior retired judge who might have been expected to contribute told me that he was “not in the business of responding to adverts”, but if he had been asked personally would have offered “such assistance as might be helpful to the Inquiry”. Why did the Inquiry not issue personal

²⁹ See Iraq Inquiry Committee, Invitation for international lawyers’ submissions (12 July 2010), available at <http://www.iraqinquiry.org.uk/news/100712-deadline-extension.aspx>.

invitations to key individuals to appear before it in a public session? Why has it not even convened a private seminar amongst invited international legal experts, as it has done on other matters? The approach taken raises questions of process.

Many observers are troubled by the apparent lack of transparency. I understand, for example, that the Inquiry has received 31 submissions in response to its advertisement, yet two months on, these submissions have not been posted on the Inquiry web site. This is despite repeated media requests. This contrasts with the approach taken to expertise in other areas: the Inquiry has held a “series of seminars to hear a wide range of views from experts on Iraq”, it then published the papers circulated at the seminars.

Relatedly, and in my view even more troubling, is information that the chairman of the Inquiry seems to have taken informal steps – beyond formal hearings held behind closed doors – to exchange views with notable individuals, by way of a ‘private chat’. If indeed this has happened – as one participant has described to me – this too has not been done in a transparent way. On what basis were individuals selected? Will a full list be made public of each and every person who has been seen, in public hearings or private hearings or informally, on what date, and for what purpose, and what was said?

It is not clear what is to be gained by a lack of transparency. Surely nothing can be lost by a more open approach? Eight of the 31 submissions on international law have been made public by their authors,³⁰ and I am aware of the contents of five others. 12 of the 13 that I have seen are sharply critical of the legal arguments made in favour of war, and only one provides a modicum of support for the “view” expressed by Lord Goldsmith on 17 March 2003. It will be interesting to see whether, and if so to what extent, the Inquiry received a “wide range of views” from experts on international law. It seems doubtful that a well attended expert seminar could attract a “wide range of views”. Those who have spoken positively and publicly in support for the legality of the war are few and far between. The only international lawyer in this country I could find who has gone into print – *The Times* newspaper – has since been elected as a judge at the International Court of Justice, and that article properly disclosed the author’s role by which he “assisted the Government on the Iraq conflict”.³¹ Two others have, in the past, referred to the Government’s arguments

³⁰ See Submissions from international lawyers, available at http://www.iraqinquirydigest.org/?page_id=154#submissions (accessed November 2010).

as being reasonable.³² That's about it. I could not find a single law review article in this country supporting the argument.

With great respect, where issues of such gravity are at stake, where the lives of British servicemen and women are at stake, when tens of thousands of Iraqi civilians will be killed, where the viability of an entire country is put into question, where you are advised that war will cause millions of refugees to leave Iraq, in such circumstances nothing less than a clear legal case can be sufficient: that is indeed what Mr Blair said he had. Earlier this month, seven and a half years after the war was launched, some fifty Iraqi Christians were killed in yet another barbarous attack, this time on the Sayidat al-Nejat church in the Karrada neighbourhood of Baghdad. This prompted reports that some Iraqi religious leaders were urging their followers to leave the country.³³ How can these and the other terrible human consequences of the war be justified on the grounds of a mere arguable or reasonable case? How could the government have taken this country to war on the basis of a legal argument that – if the boot were on the other foot - would fail even to gain access to legal aid?

* * *

Baroness Falkner, ladies and gentlemen, Iraq will not be the last time the United Kingdom uses military force abroad. As I noted at the beginning of this lecture, Iran is on the horizon, and the Chilcot Inquiry's recommendations can ensure that the obvious errors in the processes of decision-making will not be repeated, not least the preparation, use and presentation of intelligence and legal advice. At some point, the government's legal advisers – at the Foreign Office and in the person of the Attorney General – may well have to advise on the legality of measures that may be taken to bring Iran into compliance with its obligations under the 1968 NPT. The Security Council has recently determined – again - that Iran has “so far failed to meet the requirements of the IAEA Board of Governors and to comply with resolutions 1696 (2006), 1737 (2006), 1747

³¹ Christopher Greenwood, 'Britain's war on Saddam had the law on its side: The charge of military adventurism is unfair; we upheld international law', in *The Times* (22 October 2003), available at: http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article998300.ece.

³² Owen Bowcott, 'Was the war legal? Leading lawyers give their verdict', in *The Guardian* (2 March 2004), available at <http://www.guardian.co.uk/politics/2004/mar/02/uk.internationaleducationnews>.

³³ Al Jazeera, 'French asylum for Iraqi Christians' (8 November 2010), available at <http://english.aljazeera.net/news/europe/2010/11/201011884743146470.html>.

(2007) and 1803 (2008)”, ordered Iran to “immediately suspend all reprocessing, heavy water-related and enrichment-related activities”, and imposed economic sanctions.³⁴ There is no sign that Iran is complying with this legally binding requirement. The Security Council has not authorized the use of force, and it is difficult to imagine it doing so, in light of the recent history with Iraq. Nor can it be argued that a violation by Iran of its NPT obligations would give rise to a right to use force by way of lawful counter-measure: as one international arbitral tribunal recently put it, “[i]t is a well established principle of international law that countermeasures may not involve the use of force”, this being reflected in Article 50)1)(a) of the ILC Draft Articles on State Responsibility, which states that countermeasures shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”.³⁵

Which leaves only the other rule embodied in the UN Charter, namely self-defence in accordance with Article 51, on the basis of anticipatory self-defence, or perhaps pre-emption of the kind explicitly envisaged by the Bush Administration’s US National Security Strategy of 2002.³⁶

The possibility that terrorist organisations or rogue states might obtain WMD has concentrated minds on the circumstances under which a state may be entitled to use force in self-defence, in anticipation of an actual armed attack, where there is an imminent threat. The right of anticipatory self-defence exists in international law, but must be narrowly circumscribed. As Professor Thomas Franck has put it:

"The problem with recourse to anticipatory self-defence is its ambiguity. In the right circumstances, it can be a prescient measure that, at low cost, extinguishes the fuse of a powder keg. In the wrong circumstances, it can cause the very calamity it anticipates."³⁷

³⁴ UN Security Council, Resolution 1929, UN Doc S/RES/1929, 9 June 2010.

³⁵ *Guyana v Suriname*, Award of Annex VII Tribunal established under the UN Convention on the Law of the Sea, 17 September 2007, at para. 446.

³⁶ Cite, p. 15. This stated that: “The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively. [...] in an age where the enemies of civilisation openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.”

³⁷ *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002, p 107.

In what circumstances might a threat be said to be imminent, such as to justify the exercise of anticipatory self-defence? Does it encompass threats which have not yet materialised but which might materialise some time in the future? These are issues to which the Attorney General may have to turn his mind, if he has not done so already. It is noteworthy, that on this issue, in this country, there exists a considerable consensus as to the basic principles, even amongst those who may not have agreed on Iraq. In October 2002, Professor (now Judge) Christopher Greenwood told the House of Commons Select Committee on Foreign Affairs that “so far as talk of a doctrine of ‘pre-emption’ is intended to refer to a broader right to respond to threats which might materialise some time in the future, I believe that such a doctrine has no basis in law”.³⁸ In April 2004, in the House of Lords, then Attorney General Lord Goldsmith was asked by Lord Thomas of Gresford whether the Government accepted the legitimacy of pre-emptive armed attack under Article 51. He responded that it was “the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote”.³⁹ He recognised - rightly in my view - that these rules had to be applied in the context of the particular facts of each case, so that the “concept of what constitutes an ‘imminent’ armed attack will develop to meet new circumstances and new threats”, and that “that states are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.” Even here, military action had to be a last resort, and the force used proportionate to the threat faced and limited to what is necessary to deal with the threat. The key issue, then, is whether an attack is “imminent”. In the *Caroline* incident in 1837 the US Secretary of State famously set out the circumstances of a “necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation”.

The concept of imminence is a flexible one, as it must be in an age in which technology allows massive devastation and great loss of life to be wrought in a very short period of time. “Imminence” has to be determined by reference to at least two factors: capability

³⁸ Professor Christopher Greenwood, *Memorandum on Legality of Using Force Against Iraq*, 24 October 2002, at para 24; <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfa/196/2102406.htm>

³⁹ *Hansard*, 21 April 2004, column 370.

and intent. There may be circumstances in which capability could include the acquisition (by a state or a terrorist organisation or even an individual on behalf of a terrorist organisation) of material or component parts to be used in the manufacture of WMD, and not possession of the finished product, all the more so where it is violation of an international obligation. That said, Iran could easily put itself in the same situation as Pakistan or Israel or North Korea, by withdrawing from the NPT and opting out of any legal obligation not to acquire nuclear weapons. Can possession of nuclear weapons, as such and alone, amount to threat of use in violation of Article 2(4) of the UN Charter? In 1995, in its Advisory Opinion on the Legality of the Use of Nuclear Weapons, in response to the argument put forward by some States that possession of nuclear weapons is itself an unlawful threat to use force, the majority did not exclude the possibility; the Court recognised that possession “may indeed justify an inference of preparedness to use them.” However, the question of whether this amounted to a "threat" that was contrary to Article 2(4) depended

“upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter”.⁴⁰

In the case of Iran, the determination of whether its possession of nuclear weapons “would be directed against the territorial integrity or political independence” of Israel, or of any other State, is essentially a question of fact. It turns, amongst other factors, on the nature of the weapon, the delivery mechanism, and an assessment of whether there is truly an intent to use it. In this context, it has to be said that Iran has not helped itself: repeated statements by President Ahmadinejad, to the effect that he would like to see Israel destroyed, can only provide support for those who seek to use military force to prevent a future threat from arising. Whether these words amount to a statement of intent, and if so whether they reflect an actual capacity on the part of that particular leader to actualise an order to use nuclear weapons, requires the most careful consideration, given

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ICJ, Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports 1996*, p. 226, at para. 48.

the potentially catastrophic consequences of an erroneous assessment, either way.

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This is why the restoration of public trust, so deeply damaged by Iraq, is of paramount importance. If it does nothing else, the Chilcot Inquiry has to be judged by its ability to do that. Against this background, the Chilcot inquiry can surely make an important contribution by making sure that the obvious errors of governmental decision-making are not repeated. In my short submission to the Chilcot Inquiry I focused on two issues of process, both relevant to coming challenges. The first is the timing of the Attorney General's advice, that so damaged the independence of the office of Attorney-General. "By seeking final advice ... so late in the day", I wrote, "the Prime Minister placed the Attorney General in a situation in which he would be – or would be seen to be – subject to extraneous political pressures." A second issue is that of the presentation of legal advice: it is now clear that Lord Goldsmith's answer to a Parliamentary question was nothing more than an advocacy piece written by committee, setting out the best possible argument for the legality of the war (and a weak one at that). It was not, and did not purport to be, an opinion or an advice as any lawyer in this country would understand the term – that is 'Opinion' with a big, capital 'O', as it were, which is a reasoned analysis of a legal problem. According to the Attorney General the parliamentary answer only set out his "view", whatever that novel term may mean. Yet when the Prime Minister introduced the war debate in the House of Commons on 18 March 2003, he treated the Attorney-General's 337 words as though they reflected a formal legal opinion: the resolution moved before the House of Commons referred to the "opinion of the Attorney General".⁴¹ I regret that to have been so very misleading.

Against this background, when the Chilcot report finally emerges, I hope that its recommendations on process include the following:

- first, to insist that the Attorney General is required to provide early and full advice on the legality of a future use of force, to ensure that any policy and decisions are fixed around the law, and not the other way round;
- second, to remind the Government that the role of the Attorney General is to provide advice to all of Government, not just to the Prime Minister;

⁴¹ House of Commons, Transcript of the Hansard Debate (18 March 2003), at Column 760, available at <http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo030318/debtext/30318-06.htm>.

- third, to remind all Ministers to treat government legal advisers and the advice they give with appropriate respect;
- fourth, to ensure that means are found to provide for an appropriate Parliamentary Committee to be given an oversight role on legal advice relating to war, under suitable conditions of confidentiality;
- fifth, to require the Cabinet Secretary to ensure that the Attorney General makes available to the Cabinet the text of relevant legal advice at each stage of the decision-making process, and to ensure that any final advice (as opposed to any advocacy document) is provided promptly and early; and
- sixth, to ensure that where the Attorney General decides to retain external legal advice, he does so in such a way as to ensure that such advice is balanced and that it reflects a range of views, recognising that ultimately the decision on the final advice will be for him or her alone.

These matters become all the more important in circumstances in which we have a coalition Government comprising two parties that may well have very different views on the use of force against Iran. The lesson from Iraq is that the legal issues need to be addressed *now*, not in the days before matters come to a head.

Baroness Falkner, ladies and gentlemen, I have been privileged to have been invited to deliver this lecture. Last month, on Remembrance Sunday, I delivered parts of this lecture at the Imperial War Museum. I was reminded of the enormous personal sacrifices that have been made by so many individuals over the ages. Because of them, we are able to enjoy liberties and freedoms today. 179 British service men and women died in Iraq, between 21 March 2003 and 19 February 2009. A great number of others have been maimed and damaged, some terribly. To them, to their families, to their friends, to those who have lost their lives in Afghanistan and other places, over the years and decades, we owe the greatest debt. In their memory, we have a duty to ensure that never again does a British government take the country to war in such lamentable circumstances. To those in our armed services, and to our citizens, the lawyers have a particular responsibility and owe a particular duty of care on matters of War and Law. So does the Chilcot Inquiry. Let us hope that it will be able to speak truth to power, no more, no less.

Thank you for your kind attention.